



No. 96-80

**The University of the State of New York**  
**The State Education Department**  
State Review Officer

**Application of a CHILD WITH A DISABILITY, by his parent,  
for review of a determination of a hearing officer relating to the  
provision of educational services by the Board of Education of  
the City School District of the City of New York**

**Appearances:**

Certain and Newman, LLP, attorneys for petitioner, Michael Newman, Esq., of counsel  
Hon. Paul A. Crotty, Corporation Counsel, attorney for respondent, Steven Weiss, Esq., of  
counsel

**DECISION**

Petitioner appeals from the decision of an impartial hearing officer which upheld a recommendation by the committee on special education (CSE) of Community School District No. 26 that petitioner's son be enrolled in respondent's modified instructional services-1 (MIS-1) program in P. 80, which is in Community School District No. 28 where the child resides, for the 1996-97 school year. The hearing officer did, however, modify the CSE's recommendation by requiring respondent to provide the boy with a twelve-month instructional program, and she ordered the CSE to further evaluate the child. Petitioner contends that the MIS-I program is inappropriate for his son. He does not object to the hearing officer's order requiring that his son be further evaluated. The appeal must be sustained in part.

Petitioner's son, who is twelve years old, has reportedly been diagnosed as having a form of leukodystrophy. His neurologist has opined that the boy may have a variant of Pelizaeus-Merzbacker disease. That disease has affected his central nervous system. In addition, he was

diagnosed as having spastic quadriparesis (partial paralysis of all four limbs). The boy also has severe deficits in his communication skills, which have made it difficult to accurately assess his ability and skills. In a 1992 bilingual psychological evaluation, the child's cognitive skills were estimated to be in the below average range, while one year later the boy achieved a score within the average range of intelligence on the Columbia Mental Maturity Scale. Notwithstanding the multiple disabilities which he has, the child has been classified as orthopedically impaired. His classification is not challenged in this proceeding, and I do not review its appropriateness (Hiller v. Bd. of Ed. Brunswick CSD et al., 674 F. Supp. 73 [N.D. N.Y., 1987]).

The child entered a special education preschool program when he was approximately three years old. Thereafter, he entered the Marathon School of respondent's Center for the Multiply Handicapped, in which he was reportedly enrolled in a specialized instructional environment-I (SIE-I) program, and he received various related services. While in that program, the boy reportedly began to communicate with the use of the facilitated communication technique. In 1993, the CSE was advised by the SIE-I staff who had worked with the child that the boy appeared to have more ability than most of his peers in the SIE-I program.

The child was re-evaluated by the CSE, and by the Henry Viscardi School (Viscardi) in Albertson, New York. Viscardi is a private school which is subject to the visitation of the Commissioner of Education, pursuant to Article 85 of the Education Law. A board of education may meet its obligation to provide a student with a free appropriate public education by having the Commissioner of Education appoint the student to attend an Article 85 school like Viscardi, upon the recommendation of the board of education's CSE (8 NYCRR 200.7 [d][ii]). The CSE recommended a State appointment of petitioner's son to the Viscardi School, which had indicated that it had an appropriate program for the child. The Commissioner appointed the child to attend Viscardi on a twelve-month basis, beginning in September, 1993.

During most of the boy's first year in Viscardi, his teacher reportedly continued to use the facilitated communication technique with him. However, the teacher reportedly stopped using the technique because she was concerned about the validity of the child's responses to questions and directions when the technique was used. The boy's teacher at Viscardi for the 1994-95 and 1995-96 school years testified that she had briefly used the facilitated communication technique with the boy, but she had not had success with it. At the hearing various witnesses, including the child's private speech/language therapist, expressed doubt about the validity of that technique. Although there was some conflicting testimony at the hearing about the child's progress at Viscardi during the 1993-94 and 1994-95 school years, there is no written evidence of his achievement during those school years in the record which is before me.

During the 1994-95 school year, the child reportedly received some training in the use of head switches to maneuver in a motorized wheelchair. However, the Viscardi staff were reportedly concerned about the safety of other students, if petitioner's son used a motorized wheelchair. In October, 1995, one of respondent's physical therapists who evaluated the child noted that the child had some trouble stopping his wheelchair, but she indicated that his

performance appeared to improve during the evaluation. The physical therapist recommended that the boy continue to be trained to use a motorized wheelchair, and that a "Neer head array" device and connecting cables be purchased to enable the child to interface with a computer or other augmentative communication device. Respondent's educational evaluator, who observed the child at Viscardi shortly after a head array device was installed, reported that the child appeared to have difficulty maintaining his head in an upright position, which was necessary to keep the motorized wheelchair stopped. The child's physical therapist at Viscardi reported that the child's ability to control his motorized wheelchair improved during the Fall of 1995, but he continued to have difficulty stopping the wheelchair. The boy's occupational therapist reported that he had worked with the boy to develop the latter's control of his trunk, i.e., upper torso, and his upper extremities, but that the child continued to have difficulty consistently controlling his wheelchair.

In December, 1995, petitioner's son was tested at Viscardi by one of respondent's educational evaluators. The evaluator reported that visual cues for each test question were placed directly in front of the child, and thereafter were moved to the boy's left and right. The child indicated his responses to test questions by moving his arms towards the cues which were to his left and right. Facilitated communication was not used. The boy responded more quickly to conversational questions, e.g. "Do you like school?" than to academically oriented questions. The evaluator reported that he had used sample questions, rather than asking all of the test questions at a particular grade level, and he cautioned against relying solely on the test results in making a placement decision for the boy. The boy answered two of seven letter recognition questions correctly, and six of eleven word recognition questions correctly. When ten of the eighteen letter and word recognition questions were repeated, the child changed his responses to four of the questions. At the hearing, the evaluator testified that he had observed the child in his classroom give similarly inconsistent responses to questions. The evaluator reported that there was no pattern to the child's responses, i.e., that the boy was no more successful with easier questions than with harder questions (Transcript, page 196). The child also answered seven of ten arithmetic questions correctly, but again failed to display a pattern to his responses. In response to questions which were at the two - five year old level, the child correctly responded to eight of ten social studies, and seven of ten science test items. The evaluator opined that the child appeared to be guessing at the answers. He reported that the boy indicated that he had some familiarity with very basic information about his environment, but that the boy had not manifested any strong evidence of an awareness of beginning reading or arithmetic skills.

In a January, 1996 psychological evaluation, the child was addressed in Hebrew and English, because Hebrew was reportedly the dominant language in the child's home. The psychologist reported that the child appeared to easily understand instructions which were given to him in English, but that the child's responses were more spontaneous and self-confident when he was given directions in Hebrew. However, significant "scatter," i.e., variation, was noted in both his Hebrew and English communication skills. The school psychologist opined that the child's standardized test results should be interpreted cautiously because of the boy's bilingual background and communication skill deficits. On the Test of Nonverbal Intelligence, second edition, the child achieved a score of less than 57, which the evaluator described as being in the

"very poor" range of intelligence. His scores on the portions of the Stanford Binet Intelligence Scale which could be calculated were found to be in the mentally retarded range. On the Vineland Adaptive Behavior Scales, the child manifested severe deficits in the communication, daily living skills, socialization, and motor skill domains, but the evaluator cautioned that the child's limited motor abilities could have depressed his scores on that examination. He noted that the child had poor eye-hand coordination, and required a great deal of prompting and redirection during the evaluation.

In January, 1996, the child's speech/language therapist reported that the child was more enthusiastic when his therapy involved familiar names and activities, and that his performance was better in the morning, when he could concentrate for longer periods of time. The therapist indicated that she had attempted to have the child give yes/no responses by gazing with his eyes, as well as moving his hands. However, even with facilitation by his aide, the boy's responses were reported to be inconsistent. The therapist indicated that no adequate means of communication had been established. When evaluated by one of respondent's speech/language therapists on January 19, 1996, the child was required to move his hands to the left or the right to indicate a yes or no response. The evaluator reported that the child's hand movements were very slow. She apparently did not attempt to assess his ability to communicate by moving his head and eyes. The evaluator indicated that she was unable to ascertain whether the child was focusing upon the stimuli which were presented to him. I note that the record reveals that the child received individual vision therapy once per week at Viscardi during the 1995-96 school year.

On January 26, 1996, the child's teacher reported that the boy had not evidenced progress towards achieving his short-term instructional objectives for language arts, English, social studies, mathematics, science, art, and with one exception, music.

On January 31, 1996, the CSE of Community School District No. 26 reportedly reviewed the results of the child's recent re-evaluations, and it recommended that the child's placement be changed to respondent's MIS-I program. It recommended that he be placed in a bilingual-English/Hebrew class. Although classes in the MIS-I program normally have a 15:1 child to adult ratio, the placement officer of Community School District No. 26 testified at the hearing that MIS-I classes in which physically disabled children are placed are limited to no more than twelve children. The CSE also recommended that the child continue to have the services of an individual aide, and that he receive individual physical therapy twice per week, individual occupational therapy three times per week, individual speech/language therapy three times per week, and individual vision therapy once per week. In addition, the CSE recommended that the child be provided with a head array device to control his power wheelchair, and a computer with appropriate software. The CSE met again on February 26, 1996 to discuss petitioner's concern about his son continuing to have an individual aide. Neither petitioner or his wife attended that meeting. The CSE adhered to its prior recommendation that the child's placement be changed. On or about March 5, 1996, respondent offered the child a placement in P. 80.

On March 11, 1996, petitioner requested that an impartial hearing be held to review the CSE's recommendation. The child remained at Viscardi during the pendency of this proceeding. On June 14, 1996, the child's teacher reported that the boy had still not evidenced signs of achieving his IEP short-term instructional objectives, with the exception of one objective for music, and each of his objectives in physical education. In a note at the end of her report, she indicated that the child was unable to demonstrate that he had any knowledge of the material which had been presented to him. The child's speech/language therapist at Viscardi reported that she had concentrated on having the boy identify familiar objects and respond to questions. She also had the boy perform various oral motor exercises to assist him in swallowing and to control his drooling. She noted that the child had occasionally demonstrated some success in each of these activities, but that his progress had been inconsistent. She concluded that the child had not demonstrated any consistent carryover or progress throughout the school year, except for better control of his drooling. His physical therapist reported that the child was able to maneuver his motorized wheelchair around stationary obstacles in his path, but that he continued to have difficulty stopping the wheelchair. He noted that the boy demonstrated poor head control, and needed to have his trunk supported in order to bring his head to an upright position. The physical therapist indicated that the boy did not consistently produce any functional movements with his arms or legs. The boy's occupational therapist reported that the child had on occasion responded to facilitation with active upper movement of his extremities. However, the child's response to therapeutic handling was reported to be inconsistent.

The hearing in this proceeding was scheduled to begin on April 16, 1996. It was adjourned at petitioners' request on two occasions, and at respondent's request on one occasion. It began on June 20, 1996 and it concluded on August 22, 1996. Before the hearing began, the CSE reconvened on June 10, 1996. Neither parent of the boy attended the CSE meeting. Given respondent's peculiar practice of introducing into evidence an IEP which reflects the results of at least three CSE meetings, it is difficult to ascertain what, if any, action was taken by the CSE. In any event, the CSE does not appear to have changed its prior recommendation that the child be placed in the MIS-I program.

In her decision which was rendered on September 24, 1996, the hearing officer noted that the results of the child's educational and psychological evaluations by the CSE had been called into question because the child's ability to respond correctly had been determined on the basis of his hand movements, rather than the movement of his head and eyes. She also noted that it was not clear from the record whether the child could in fact learn to communicate using either eye gaze or a head array device and computer. The hearing officer found that at least some of the boy's IEP annual goals and short-term objectives were inappropriate in light of the testimony of several of respondent's witnesses that they were unrealistically high for the boy, and the testimony of his private speech/language therapist that the child had already mastered some of them. Nevertheless, the hearing officer upheld the CSE's recommendation set forth in the boy's IEP that the boy should be enrolled in the MIS-I program. She rejected petitioner's contention that Viscardi would be an appropriate placement for his son if certain individuals who had worked with the boy were replaced. The hearing officer also noted that she had no jurisdiction over Viscardi.

She did find that the CSE had inappropriately recommended that the child receive a ten-month instructional program, and she directed the CSE to amend his IEP so that he could be instructed on a twelve-month basis. She suggested that the CSE also consider the possibility of placing petitioner's son in a private school, rather than in its MIS-I program.

Respondent objects to my consideration of certain claims which petitioner has made in his petition, on the ground that those claims were either not raised or fully developed at the hearing. For example, with regard to petitioner's claim that portions of the boy's previous IEP dated November 17, 1995 were not implemented, respondent correctly asserts that petitioner expressly declined the opportunity which was given to him to introduce the IEP into evidence. Although the alleged failure to implement a part of a child's IEP could have a significant bearing upon the appropriateness of the child's educational program or placement, I find that the record does not afford an adequate base for determining that claim, petitioner's claim that representatives of Viscardi walked out a CSE meeting in June, 1995, or petitioner's claim that no parent-teacher conference was held during the 1995-96 school year. Since this proceeding primarily concerns the child's placement for the 1996-97 school year, and I need not render a decision with regard to the other issues which petitioner now raises, I will decline to do so (Application of a Child with a Disability, Appeal No. 93-36).

Petitioner contends that the hearing officer erred in her decision by failing to consider the fact that the CSE neglected to notify petitioner that his son would be re-evaluated. I note that respondent's CSE chairperson was briefly questioned about this issue at the hearing. State regulation requires each CSE chairperson to notify a child's parents in writing prior to initiating a review or re-evaluation that the evaluative information will be sought or that a review will be conducted (8 NYCRR 200.5 [a][1]). The child's parents must be given a description of the proposed evaluation and the uses to be made of the information obtained by the evaluation, and they must be informed of their right to submit evaluation information to the CSE. Respondent contends that it provided petitioner with adequate notice of the child's re-evaluation. However, the only notice to petitioner which is in the record invited petitioner to attend the CSE meeting which was held on January 31, 1996. I find that respondent has failed to demonstrate that it complied with the regulatory requirement regarding notice to petitioner of the boy's re-evaluation.

Petitioner further contends that he and his wife were denied the opportunity to participate in the process which led to the CSE's recommendation that their son's placement be changed from Viscardi to the MIS-I program because neither he nor she attended the CSE meeting which was held on February 26, 1996. However, respondent asserts, and the record indicates, that the CSE recommended that the boy's placement be changed at its meeting on January 31, 1996. The "conference information" portion of the boy's IEP indicates that at least one of his parents attended that meeting. As noted above, the CSE meeting on February 26, 1996 was reportedly held to discuss the employment of an individual aide for the boy. However, I must remind respondent that its CSE is required to document its attempts to arrange a mutually agreed upon time for its meetings with parents, and that when a parent cannot attend a CSE meeting, the CSE

must attempt to use other methods to ensure parental participation, such as a telephone conference call (34 CFR 300.345 [c] and [d]).

Petitioner also challenges the CSE's recommendation, which the hearing officer upheld, on substantive grounds. The board of education bears the burden of demonstrating the appropriateness of the program recommended by its CSE (Matter of Handicapped Child, 22 Ed. Dept. Rep. 487; Application of a Child with a Handicapping Condition, Appeal No. 92-7; Application of a Child with a Disability, Appeal No. 93-9). To meet its burden, the board of education must show that the recommended program is reasonably calculated to allow the child to receive educational benefits (Bd. of Ed. Hendrick Hudson CSD v. Rowley, 458 U.S. 176 [1982]), and that the recommended program is the least restrictive environment for the child (34 CFR 300.550 [b]; 8 NYCRR 200.6 [a][1]). An appropriate program begins with an IEP which accurately reflects the results of evaluations to identify the child's needs, provides for the use of appropriate special education services to address the child's special education needs, and establishes annual goals and short-term instructional objectives which are related to the child's educational deficits (Application of a Child with a Disability, Appeal No. 93-9; Application of a Child with a Disability, Appeal No. 93-12).

By ordering the CSE to further evaluate the child, the hearing officer in effect found that the boy had not been adequately evaluated. Although respondent has not appealed from that portion of the hearing officer's decision, it asserts in its answer that the evaluations which were performed for its CSE were appropriate, and that the results of those evaluations were valid. I do not agree with respondent. There is a significant disparity between the results reported by the CSE's educational and speech/language evaluators and the child's performance as described by his private speech/language therapist at the hearing. Ms. Geraldine Piacente testified that she had provided individual speech/language therapy to the boy since October, 1995, and that the boy could very consistently answer yes/no questions by gazing towards the appropriate visual stimuli, i.e., the words "yes" and "no" which were placed to the left and right directly in front of the child. In support of Ms. Piacente's testimony, petitioner entered into evidence a videotape of Ms. Piacente and himself working with the child. During the videotaping, the child was initially asked to respond to questions by moving his hands and arms (the method used to assess the boy's performance in respondent's speech/language evaluation [Exhibit 9], and respondent's educational evaluation [Exhibit 19]). Ms. Piacente testified, and the videotape clearly revealed, that this was not a valid method by which to assess the child's performance because of his obvious difficulty controlling his limbs. During the videotaped sessions with Ms. Piacente and petitioner, the child appeared to be able to respond to some fairly simple questions by gazing to the left or right to signify a "yes" or "no" response. Although respondent's evaluations and some of the Viscardi staff testified at the hearing that the boy's responses were random, and frequently inconsistent, I note that he appeared to provide consistent responses to the questions which Ms. Piacente and petitioner repeated to him during the videotaped sessions. While I am unable to ascertain the child's exact levels of achievement from either Ms. Piacente's testimony or the videotape, I am persuaded that the IEP significantly understates his achievement.

A child's IEP must include a statement of his present levels of educational performance (34 CFR 300.346 [a] [1]; 8 NYCRR 200.4 [c] [2] [I]). Upon the record which is before me, I am compelled to find that the child's IEP did not accurately identify his present levels of educational performance. It is imperative that the CSE ascertain the child's most effective means of communication before it evaluates him to determine his present levels of educational performance, which I will require it to do again. While I will not specify who should re-evaluate the child, I strongly suggest that the person or persons who perform the re-evaluation should observe the child in his classroom as he interacts with his teachers and peers, and should carefully study the child's apparent use of head and/or eye movement to communicate. The evaluator(s) should also interact with the child prior to formally evaluating him, in order to minimize any negative effect which meeting a new person might have upon the boy's performance. A test protocol which clearly defines how the boy's responses will be scored should be prepared before the testing begins. The evaluation should include an assessment of the child's communication (speech/language) skills, as well as his educational achievement.

Once the child's most effective means of communication and his present levels of educational performance have been ascertained, the CSE must prepare appropriate IEP annual goals and short-term instructional objectives. Although I find that it would serve no useful purpose to review the child's present IEP annual goals and objectives for content, in light of the uncertainty of his present levels of performance, I must point out that the goals and objectives for speech/language therapy which are set forth in Exhibit 1 are vague and lack the required objective standards for measuring achievement (34 CFR 300.346 [a] [5]).

After the CSE has ascertained the child's present levels of performance, and it has prepared appropriate annual goals, i.e., statements of what the child can reasonably be expected to accomplish within a twelve-month period, the CSE must then determine what educational services are required to afford the child a reasonable opportunity to achieve his annual goals. The CSE will then determine the setting in which those services are to be provided, i.e., the placement. It would clearly be premature at this point to determine what an appropriate setting would be for the child. Therefore, I must annul the hearing officer's decision upholding the CSE's recommendation that the child be placed in respondent's MIS-I program, and I must deny petitioner's request that I find that Viscardi would be an appropriate placement for his son.

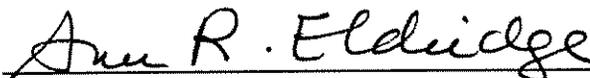
I have considered the other contentions which the parties have made, and I find that they are without merit. With regard to petitioner's request that I award him attorney's fees, I note that the authority to award fees rests with the reviewing court pursuant to 20 USC 1415 (e) (4), rather than with an administrative officer (Application of a Child with a Disability, Appeal No. 94-18).

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the hearing officer's decision upholding the CSE's recommendation that the child be placed in respondent's MIS-I program is hereby annulled, and;

**IT IS FURTHER ORDERED** that respondent's CSE shall arrange to have petitioner's son re-evaluated as indicated above within 15 days after the date of this decision.

**Dated:** Albany, New York  
May 23, 1997

  
ANN R. ELDRIDGE